April 18, 1996

REPORT TO THE COMMITTEE ON RULES, FINANCE AND INTERGOVERNMENTAL RELATIONS

RIGHT-OF-WAY ORDINANCE/PAVEMENT QUALITY PRESERVATION

BACKGROUND

At the Rules Committee hearing on February 5, 1996, the Committee considered an ordinance that would make certain modifications to requirements for placing installations in the public rights-of-way. At that time, the Committee forwarded to the full Council all but one portion of the proposed ordinance, a section imposing a requirement to either repave whenever an installation (as defined) is placed in the right-of-way or pay a fee in lieu. Our office was requested to more fully analyze: 1) whether the existing franchises with various public utilities (including cable companies) limited the City's ability to impose the repaving requirement; and, 2) whether sufficient evidence supported the imposition of either the repaving requirement or the fee in lieu.

CONCLUSIONS

The City's current franchises with San Diego Gas & Electric Co. ("SDG&E"), Cox Cable ("Cox"), and American Television and Communications Corp. ("American") do not limit the City's ability to impose reasonable requirements and, in fact, expressly allow the new regulations. In

addition, it is the opinion of the City Attorney's Office that sufficient evidence, in the way of studies performed for other cities, exists to support a conclusion that excavation into the right-of-way

simply repaired by recapping, as opposed to repaving, substantially decreases the useful life of pavement. Thus, the Council would be justified in imposing a repaving requirement that was reasonably related to the extent of the harm done to the right-of-way. In the alternative, the Council could adopt a fee in lieu option for the person or entity doing the excavating. However, it is strongly recommended that the authorization to adopt the fee require an analysis and justification that clearly relates the in lieu fee to the corresponding repaving requirement.

ANALYSIS

A. FRANCHISES

As mentioned above, the City has franchises with three companies relevant to this report, SDG&E, Cox and American. Each of these is analyzed separately below. An important aspect of this analysis is that the repaving requirement will apply to all persons or entities placing installations in the right-of-way, not just the companies mentioned in this Report.F

> The plethora of private companies who do not specifically hold "City franchises" to use the public right-of-way but claim some sort of "statewide" franchise are not the subject of this Report, but needless to say it has become a significant problem to City administrators, thus they will also be covered by these requirements.

Thus, these companies are not singled out for special treatment but, rather, are subject to a new law of general applicability. Furthermore, that law would be adopted pursuant to the City's general police power to provide for the health, safety and welfare of its citizens.

1. SDG&E

The City actually has three franchises with SDG&E: for gas,

electricity and steam. Each of the franchises is identical with respect to the issues discussed in this Report. The purpose of each franchise is for SDG&E to, in relevant part, "construct, maintain and use in ╒Cityσ streets all poles, wires, conduits and appurtenances . . . necessary to transmit and distribute" gas, electricity or steam.F

> The phrase "poles, wires, conduits and appurtenances" is defined in the franchises to mean basically anything on, over or under the public rights-of-way used for the transmission and distribution of gas, electricity or steam. These things are also referred to as "facilities."

The consideration for the franchise is the payment each year of a percentage of SDG&E's gross receipts, otherwise known as the "franchise fee." Furthermore, each franchise required SDG&E and the City to cooperate in the preparation, and review each year, of a "manual of administrative practices" (the "manual"). This document was prepared and has been utilized throughout the years.F

> Apparently, as set forth in the "Recital" clauses of the proposed ordinance forwarded to the full Council, the "cooperative" manual has not adequately addressed the problems in the past and the proposed ordinance is deemed necessary to more adequately address the deteriorating street paving problem in a mandatory and all-encompassing manner.

It is not clear what SDG&E's position is with regard to this matter. For purposes of this discussion, we assume that SDG&E will claim that the payment of the franchise fee, and the application of the manual, are the sole means of addressing SDG&E's obligations with regard to the right-of-way. In other words, SDG&E might claim that it cannot be required to pay a fee because its monetary obligation is limited to the franchise fee, and it cannot be required to repave because the manual does not provide for it and a change to the manual has not been negotiated.

These positions might have some merit but for two other provisions of the franchises. One section, entitled "Compliance with Laws" provides: "All facilities or equipment of ╒SDG&Eσ that ╒SDG&Eσ shall construct, maintain and use or remove, pursuant to the provisions of the franchise . . . shall be accomplished in accordance with the ordinances,

rules and regulations of City now or as hereafter adopted or prescribed . . . ." (Emphasis added.) Another section, entitled "Repair Costs" provides: "ꟳSDG&Eσ shall pay to City on demand the cost of all repairs to City property made necessary by any of the operations of ꟳSDG&Eσ . . . provided however that ꟳSDG&Eσ may make repairs to streets, sidewalks curbs and gutters itself at its own cost in accordance with City specifications . . . ." (Emphasis added.) These two provisions make clear to us that the City retained the right to adopt later laws or regulations governing the placement of facilities in the right-of-way and may require the payment of all repair costs unless SDG&E elects to make such repairs in accordance with City regulations. It is the opinion of the City Attorney's Office that these two specific provisions allow the City to impose on SDG&E the repaving requirement of the proposed ordinance, even though the requirements might exceed obligations under the manual, or allow SDG&E to elect to pay a fee in lieu of repaving. In other words, the cooperative manual concept contained within the franchise is not the only remedy available to the City under these circumstances. This view is confirmed by the personal recollection of former Assistant City Attorney Curtis Fitzpatrick who participated in the negotiations for the franchise in 1969-70, drafted the documents, and assisted in the preparation of this Report as Special Counsel to the City Attorney.

2. COX

The City's franchise with Cox (formerly Mission Cable) treats these issues somewhat differently, although the result is essentially the same. The franchise grants to Cox the authority to "use the public streets, other public rights of way or public places in ꟳtheσ City, to engage in the business of operating a Cable Television System."F

> A "Cable Television System" is defined in the franchise as basically anything used to produce, receive, amplify and distribute audio, video and other forms of electronic or electrical signals.

Cox may, pursuant to the franchise, "construct, maintain and operate wires, cables, poles, conduits, manholes and other television conductors and equipment necessary for the maintenance and operation of" its system. In return for the franchise Cox pays a franchise fee which is paid as "rental for use of the public right of way in lieu of any fee or tax prescribed by City for the same period, but only to the extent of such payment."

Cox contends that the extent of the franchise includes the right to excavate. According to Cox, that right to excavate necessarily includes any incidental damage caused by the excavation and the City may not impose additional repaving requirements. In addition, Cox contends that the franchise fee sets a threshold for the imposition of any other fees that Cox might be required to pay. In other words, Cox contends that the City may not collect additional fees from it until the level of additional fees to be collected exceeds the franchise fee, and then Cox is liable to pay only that amount in excess of the franchise fee. Thus, Cox contends, the City may not collect a fee in lieu of a repaving requirement until any fee in lieu exceeds the franchise fee level. It is safe to say that such a fee in lieu probably will never exceed that amount.

Cox's position does not, in our opinion, have merit. The franchise fee is paid solely for the privilege of being in or using the right-of-way, and does not give Cox carte blanche to cause damage to the right-of-way. This proposition is made clear by other provisions of the franchise which provide that: 1) Cox is not relieved of "any requirement of . . . any ordinance, rule, regulation or specification of ┌theσ City now or hereafter in effect, including, but not limited to, any requirement relating to street work, street excavation permits, . . . or the use, removal or relocation of property in streets." (Emphasis added.); 2) no privilege or exemption is granted or conferred except as specifically set forth or necessarily included in the franchise; 3) the City reserved to itself all rights and powers under the Charter and any ordinances of the City, and Cox agreed to be bound by the reasonable exercise of any such power; and, 4) Cox agreed to reimburse the City for expenses incurred by the City if Cox failed to "commence, pursue or complete any work required by law or by ┌the franchiseσ to be done in any street, within the time prescribed and to the satisfaction of the City Manager." (Emphasis added.) These provisions, in the opinion of the City Attorney's Office, allow the City to impose a repaving requirement or, at Cox's election, the payment of a fee in lieu.

3. AMERICAN

American is the successor to a number of cable companies, including

Southwestern Cable. Its franchise is virtually identical to Cox's in the terms and conditions discussed in Part 2, above. Thus, a similar rationale applies and the City is not precluded by the franchise language from imposing a repaving requirement or fee in lieu on American.F

Our views are again supported by the views and recollections of Mr. Fitzpatrick, who played a similar role in the Cox and American franchise negotiations.

B. EVIDENCE TO SUPPORT ORDINANCE

As mentioned above, the proposed ordinance would be adopted pursuant to the City's general police power. Generally, such a law is presumed valid. Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 814 (1989). The law will be found valid if it is reasonably related to the legislative purpose, not arbitrary or capricious, and if evidence exists in the record to support its adoption, whether or not conflicting evidence also exists. See generally Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 161, 165 (1976); Crownover v. Musick, 9 Cal. 3d 405, 424 (1973), cert. denied, 415 U.S. 931 (1974); Loska v. Superior Court, 188 Cal. App. 3d 569, 575 (1986). Thus, it does not matter whether somebody disagrees with the evidence supporting the law, and the courts will not substitute their judgement for that of the legislative body. Birkenfeld at 161; Crownover at 424; Loska at 575.

Here, the City Engineer has reviewed several studies, including a very recent study performed for the City of San Francisco, that conclude that cuts into pavement decrease the pavement's useful life and that repaving ameliorates that effect. We are thus of the opinion that substantial evidence exists to support the adoption of the repaving requirement as a reasonable response to the problem identified by the City Manager and his staff.

The fee in lieu option presents a slightly different question. The City may lawfully enact a regulatory fee not exceeding the sum reasonably necessary to cover the costs of the regulatory purpose. Mills v. Trinity County, 108 Cal. App. 3d 656, 661 (1980). The City may not enact a measure designed to raise revenue (a tax) under the guise of a regulatory fee. Id. Here, the regulation being imposed is the

repaving requirement. In lieu of that, and at the affected person or entity's option, a fee may be paid to cover the City's costs to repave. The Companies are rightly concerned that the fee not exceed the costs reasonably necessary for the City to perform the required repaving, and that the fee not substitute for the City's general obligation for upkeep of City streets.F

We are unsure whether this analysis strictly applies to this circumstance as the fee would be paid at the option of the person or entity otherwise required to repave. Thus, strictly speaking, the fee is not being exacted in the first instance, as is an inspection or other type of regulatory fee. To be prudent, we assume the analysis applies.

We suggest that, to overcome this objection, staff be required to justify the level of fee as being proportional to the City's cost to do the repaving otherwise needed. This justification need not be presented to the Council at this time, if the Council wishes to authorize the City Manager to set the fee, but the justification must be formulated especially in the event that a court challenge is brought on the proposed ordinance.

CONCLUSION

The language of the City's various franchises do not prohibit the City from adopting and enforcing an ordinance of general applicability which imposes a repaving requirement on all persons or entities placing installations in the public rights-of-way. In addition, the franchises also do not prohibit the City from adopting a fee in lieu alternative to the repaving requirement. Finally, substantial evidence exists to support the adoption of the proposed ordinance as a lawful exercise of the City's general police power. Care should be taken, however, that the measure of any fee in lieu be relative to the City's cost to perform the repaving otherwise required.

Respectfully submitted,

JOHN W. WITT
City Attorney

LJG:lc:480x740(043.1)
RC-96-19